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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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On August 10, 1979, the Board issued its decision in the unfair labor practice proceeding, concluding that petitioner Union's handbilling and other publicity did not violate Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B). Accordingly, the Board dismissed the complaint that had been issued against the Union. *United Steelworkers of America, AFL-CIO-CLC (Pet, Inc.)*, 244 N.L.R.B. No. 6.[1]

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[1]The Board concluded that Hussmann was a "producer" of Pet products within the meaning of the proviso to Section 8(b)(4) of the Act. (The proviso is set out at Br. in Opp. 3). The Board explained (slip op. 18-19):

> [A] union can lawfully urge, via handbilling or other non-picketing publicity, a total consumer boycott of a neutral

The question raised by the petition—whether the court of appeals properly ordered the issuance of an injunction here—is thus no longer a live issue. By its terms, Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), authorizes the issuance of an injunction only "pending the final adjudication of the Board with respect to [the] matter." Since the Board has issued its decision dismissing the complaint, there has been a "final adjudication of the Board," and there is no longer any basis for a Section 10(*l*) injunction. Moreover, the injunction issued by the district court expired by its own terms on September 11, 1979. Therefore, this case has become moot.[2]

Because the case became moot after the decision of the court of appeals, and the petition would not otherwise have been granted, this Court should deny the petition rather than vacating the judgment below. The reasons why this is the appropriate course are discussed in our brief in opposition in *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978), a copy of which we are serving on petitioner. See also our briefs in *Aqua*

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employer, so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a product of the neutral employer. Applying these principles to the facts herein, we find that as a result of its relationship with the diversified Pet enterprise, Hussmann applies capital, enterprise, and service to Pet and its other subsidiaries and divisions. We therefore conclude that Hussmann is a "producer" of the products of Pet and its other subsidiaries and divisions as that term is used in the publicity proviso and that [the Union's] total consumer boycott of said products is thus exempt from the proscriptions of Section 8(b)(4) of the Act.

[2] *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), is not to the contrary. There, petitioners, in addition to seeking injunctive relief, sought declaratory relief challenging the legality of a state statute. The court held that their interest in resolution of the latter issue survived the dissolution of the injunction. Here, the issues raised in the petition go only to the propriety of issuance of the injunction, which is now an academic matter.

Media, Ltd. v. *United States*, cert. denied, 439 U.S. 959 (1978), and *Texas State Board of Public Accountancy* v. *United States*, petition for cert. pending, No. 78-1811.

For these reasons, as well as those discussed in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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